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No. 90-1683

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NORMAN HARTNESS, *ET AL.*,

PETITIONERS

v.

GEORGE HERBERT WALKER BUSH, *ET AL.*,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF PETITIONERS IN REPLY TO RESPONDENTS' OPPOSITION

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI

Petitioners hereby offer this reply to Respondents' Brief in Opposition to the issuance of a writ of certiorari in this case.

ARGUMENT

1. The government's opposition ignores the *raison d'être* of the petition, namely that the decision of the court below would appear to permit the repeated mandatory random urinalysis drug testing of more than two million federal and federally regulated employees simply because they hold a "secret" security clearance. Certiorari should be granted because the vast manifestations of "secret" data and "secret" clearance holders make the use of such a proxy for the fact-specific, case-by-case analysis

mandated by this Court in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), inappropriate. Whether any of the over two million "secret" clearance holders can be randomly tested cannot properly be determined without an analysis of whether they have access to the type of "truly sensitive" information this Court contemplated in *Von Raab*. The result should be different for a federal employee who works as an economist or trade specialist at the Office of the USTR or budget examiner at OMB than for a federal employee who works on nuclear submarines for the Navy.

2. The government's attempt to distinguish the positions designated for testing in this case from the positions designated in *Von Raab* must fail. The sole distinction offered is that petitioners possess a "secret" security clearance. Brief in Opposition at 9 (hereinafter "Opp. at ___"). But in substance, the "clerical assistants," "clerk-typists" and "budget analysts" involved in this case are no different from the "baggage clerk," "mail clerk/assistant" or "accountant" in *Von Raab*, for whom testing was found inappropriate because it was not clear that they were "likely to gain access to sensitive information." *Von Raab*, 489 U.S. at 678. As the declarations filed in the District Court by several petitioners reveal, the information to which they have access is far from "truly sensitive"; rather, it is the sort of information that is commonly available to lower- and mid-level professional employees in other federal agencies and departments. *See* Pet. at 13. Moreover, as discussed below, the distinction put forward by the government is suspect

because the EOP plan did not specifically focus on the level of clearance associated with the positions designated for testing. *See* Pet. at 6-7.

3. The four cases cited by respondents for the proposition that courts have found a compelling government interest in protecting information subject to "secret" or "top secret" classifications, Opp. at 7, do not stand for that proposition. In those cases, the level of clearance was not important; rather, the *substance* of the information was dispositive. For example, in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), a civilian employee was denied a security clearance which would have allowed him access to secret or confidential information concerning the Trident ballistic missile submarine, "described as the most sophisticated and sensitive weapon in the Navy's arsenal and as playing a crucial part in our Nation's defense system." *Id.* at 520, 521 n.1. In *Snepp v. United States*, 444 U.S. 507 (1980), the information at issue included "'information regarding intelligence sources and methods.'" *Id.* at 511 (citation omitted). The *Snepp* Court, in a footnote, emphasized that "[f]ew types of governmental employment involve a higher degree of trust than that reposed in a CIA employee with Snepp's duties." *Id.* at 511 n. 6. In *United States v. Reynolds*, 345 U.S. 1 (1953), which involved the crash of a B-29 bomber testing secret electronic equipment, this Court upheld the government's refusal to produce Air Force investigation reports in suits by widows of three civilian observers on the asserted ground that the materials could not be furnished "'without seriously hampering national

security, flying safety, and the development of highly trained technical and secret military equipment.'" *Id.* at 4-5 (citing affidavit of U.S. Air Force Judge Advocate General). Finally, in *Totten v. United States*, 92 U.S. 105 (1875), the information at issue concerned "the number of troops stationed at different points in the insurrectionary [Confederate] States,... plans of fortification, and ... such other information as might be beneficial...." gathered by a spy on behalf of President Abraham Lincoln. *Id.*

Each of the foregoing cases dealt with classified information in the military or intelligence field, the type of information traditionally associated with issues regarding national security. This is the type of "truly sensitive" information this Court apparently contemplated in *Von Raab* when it cited *Egan*. *Von Raab*, 489 U.S. at 677. Here, there has been no showing that petitioners have access to that type of information or to information of equivalent sensitivity. *See* Pet. at 13. Indeed, the result of the government's approach, which substitutes a "secret" label for the *Von Raab* analysis, is that there is no way for a court to know what types of information the proposed testees may see.

4. The cases cited by the government in support of its assertion that several lower courts have approved random testing of government employees in sensitive positions, Opp. at 5, simply serve to demonstrate the appropriateness of the fact-specific, case-by-case analysis mandated by *Von Raab*. Each of the cases cited by respondents employed a fact-specific analysis; none permitted the use

of a mere label, such as a security clearance, as a proxy for testing.

For example, in *Guiney v. Roache*, 873 F.2d 1557 (1st Cir.), *cert. denied*, 493 U.S. 963 (1989), the court applied a job-specific analysis in approving random testing for police officers who carry firearms and/or participate in drug interdiction, finding them indistinguishable from the customs agents in *Von Raab*. However, finding the record insufficient to justify testing other police department employees, the court remanded for further consideration. *Id.* at 1558. In *Transport Workers' Union, Local 234 v. Southeastern Pennsylvania Transportation Authority*, 884 F.2d 709 (3d Cir. 1988), the Court of Appeals for the Third Circuit approved random testing of public transit employees noting "the careful tailoring of the program to cover only employees in safety-sensitive positions." *Id.* at 711. In *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989), the Court of Appeals for the Seventh Circuit, in approving random drug testing of correctional officers who come in regular contact with prisoners, performed an extensive factual analysis of each test designated position. 888 F.2d at 1196-1200. In performing this analysis, the court concluded that the Cook County Department of Correction's interests were "not furthered by testing all corrections officers." *Id.* at 1197. Indeed, the court concluded that the Department had defined the category of employees more broadly than necessary and decided that "only those employees in contact with prisoners are implicated by...the governmental interests here." *Id.* at 1197. Obviously, the government's position in this case is

not supported by this line of appellate decisions. In fact, it is directly contrary to their guiding principle: that random drug testing programs must be examined with care and may not be imposed upon a large and varied class of employees simply because they share a job title or some other nominal similarity.

Moreover, respondents' reliance on *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990), is misplaced. As Judge Edwards explained in his dissent below, *Harmon* was wrongly decided because it ignored *Von Raab's* teaching that random drug testing may not be imposed on a dragnet basis. However, even if *Harmon* is viewed as having been correctly decided (on the ground that all employees who hold top secret security clearances really do have access to truly sensitive information), the extension of its *per se* approach is not defensible under either the Fourth Amendment or *Von Raab*. The constitutionality of subjecting all "secret" clearance holders to random drug testing -- and the government has stated that employees who hold mere "confidential" clearances are, in its view, equally subject to random testing without further justification[1] -- is a matter worthy of this Court's attention

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1 *See* Government's Motion for Summary Reversal in the Court of Appeals for the District of Columbia Circuit, at 10 (Feb.16, 1990).

because of the vast number of employees affected and the seriousness of the intrusion on their privacy.

5. The government's assertion that drug testing plans are exempt from APA requirements misses the point of petitioners' assertion that agency counsel's post-hoc rationalization of the criteria for test designation should not be accepted by this Court. Opp. at 9. The requirement that a reviewing court "must judge the propriety of such action solely by the grounds invoked by the agency," and that the "basis must be set forth with such clarity as to be understandable," *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947), is grounded in common law, not APA procedural requirements. *See* K.Davis, 3 Administrative Law Treatise §14:22, at pp.104-05 (2d ed. 1980). Indeed, in the first *Chenery* case, this Court stated that "the orderly functioning of the process of review requires that the grounds upon which the agency acted be clearly disclosed and adequately sustained," and that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 94 (1943). Subsequently, this Court held that "*Chenery* requires that an agency's discretionary order be upheld, if at all, on the basis articulated *in the order* by the agency itself." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962)(emphasis added). Even the government does not claim that the basis on which it now seeks to justify the testing at issue in this case was articulated in the agency's order, *i.e.*, the EOP Plan. Pet. App. 77a-107a. Indeed, the government concedes that it has only become

"clear *in this litigation* that the petitioners who are the subject of this appeal have been identified for random drug testing because they hold secret security clearances." Opp. at 9 (emphasis added). More precisely, this rationale became "clear" only in the wake of *Harmon*, which was decided after the EOP Plan had been promulgated and after this lawsuit had been filed. Thus, Respondents' assertion that "there is no uncertainty with respect to *how* employees have been selected for random testing," Opp. at 9, is correct: There is no uncertainty at all that the selection was *not* made upon the basis on which it is now defended. Accordingly, whether or not the APA applies to drug testing plans, the government's *per se* testing rationale adopted during the course of litigation is not entitled to deference, and the EOP plan cannot be sustained on that basis.[2]

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2 The government notes that the court of appeals did not address this issue. Opp. at 9. However, it was presented to that court and is properly before this Court.

CONCLUSION

For the reasons stated above and in the petition, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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